



BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion No. 06-02-002

Absent a waiver, a public employee must not participate in any matter that affects any business in which a relative has an economic interest, if the public employee knows about the relative's interest. A supervisor of a public employee asks¹ whether that public employee can participate in a procurement matter where the public employee's husband is the executive director of the business contracting with the County. The Commission concludes that the employee cannot participate in that matter because it affects a business in which a relative has an economic interest.

A subsidiary question has also arisen regarding the status of volunteer members of an informal advisory committee created by a department to assist the department in identifying the needs of specific ethnic and racial communities. The employee staffs this committee. The Commission concludes that, although these committee members are not public employees subject to the ethics law, they should continue their practice of not participating in any matter that directly affects any business in which they have an economic interest. But these volunteer committee members' employers are not precluded from engaging in a procurement matter with the County merely because their employee participated, as a member of the advisory committee, in some aspect of that procurement matter.

I. THE PUBLIC EMPLOYEE

The public employee develops and manages programs that serve the needs of a particular population in the County. Her duties may be broken down into two parts: those that arise out of the programs she manages and those that arise out of a related informal advisory committee she staffs.²

¹ A supervisor may seek an advisory opinion. § 19A-7(a). Unless otherwise indicated, all references are to the Montgomery County Code (2004), as amended.

² The Commission's analysis of this matter has been complicated by the way in which the facts have been presented to it. The department provided the Commission with a memorandum on February 14, 2006, identifying the employee's duties (the "department memo"). On March 30, 2006, the employee provided the Commission with her own memorandum to correct omissions and inaccuracies in the department memorandum (the "employee memo"). The employee sent a copy of her memo to the department. The commission has not received any further information from the department. The Commission will assume that the department's memo, as corrected and supplemented by the employee's memo, is an accurate statement of the employee's duties.

A. The Programs

With regard to the programs, the public employee's duties include the following:

- Assessing the needs of this population;
- Developing and implementing comprehensive County-wide initiatives, strategies, guidelines, and programs for this population;
- Overseeing a variety of contractual matters regarding the programs, including³
 - developing scopes of services
 - preparing requests for proposals
 - reviewing bids and proposals from contractors
 - developing contracts; and
 - directing, managing, and monitoring contractors' performance;
- Developing and maintaining program budget targets; and
- Establishing and maintaining collaborative relationships with private and other public entities

Department memo at 2-4.

The employee's husband is the executive director of a business that also provides a variety of services for the same population served by the employee's programs. In fact, that business provides some of these services under a program contract. Since her marriage, the Department has taken measures to ensure that the employee has not participate in any contractual matters involving her husband's business. Employee memo at 3; Department memo at 4.

B. The Advisory Committee

The employee is also responsible for supporting an informal volunteer advisory committee created by the department to advise it on the programs she manages.⁴ These members are chosen by the department; they are not appointed by the County Executive or confirmed by the County Council.

The advisory committee provides expert guidance and technical assistance in the conceptualization, design, development, and evaluation of programs managed by the employee. Employee memo at attachment A; Department memo at 3. Committee members also "participate in decision-making and priority setting activities" for these programs. Employee memo at attachment A. Some of the committee's members are paid employees of entities that provide

³ The employee denies that she is responsible for developing program contracts. Employee memo at 3. This conflict is addressed below.

⁴ The Department memo actually describes the committee as the "planning body" for the programs the employee manages. Department memo at 3

services for the same target population served by the programs. In fact, two of the committee's members are employed by two of the program's contractors.

Committee members have no formal role in the procurement process. They do not develop Requests For Proposals (RFP); they do not select the members of the Qualification & Selection Committee (QSC) who review proposals; they do not make recommendations regarding potential awardees; and they do not participate in contract negotiations. Employee memo at 2. But committee members do identify areas of need for the population they serve, including recommendations for specific programs. These recommendations can ultimately lead to procurement activity, including program contracts with a committee member's employer. Department memo at 4.

Therefore, the committee has established its own "Conflict of Interest Guidelines" to address situations where a committee member might find himself participating in a matter affecting his employer as a potential program contractor. The guidelines require committee members to disclose their affiliation (employment, board membership, etc) with organizations that have or may seek department funding. These guidelines provide: "Personal or organizations [sic] financial gain by . . . committee members is prohibited. Financial gain for organizations represented by the members is likewise prohibited." The guidelines also state that "any member of the . . . committee who has disclosed or been found to have a conflict of interest in relation to a particular matter must refrain from participation in the discussion of that matter." According to the employee, committee members cannot participate in any "conversations that would involve recommendations for specific programs or budgets related to or that could impact their organizations." Employee memo at 4. Finally, the guidelines prohibit any committee member from divulging "designated confidential information acquired in the course of official . . . committee duties in advance of authorized release time." Employee memo at 4.

The employee's responsibilities for supporting the committee include:

- Advising the committee about the progress of programs directly implemented by the department (according to the employee, progress reports regarding contractor programs are provided directly by the contractors themselves - employee memo at 3);
- Advising the department about the committee's concerns;
- Providing the department the committee's budget request
- Supporting the committee by
 - maintaining reports, records, and other papers
 - keeping minutes of all meetings
 - notifying members and observers of the time and place of meetings
 - maintaining a sign-in sheet
 - maintaining the web site
 - preparing the annual report
- Providing orientation and training to new committee members

C. Analysis

Absent a waiver, a public employee must not participate in any matter that affects, in a manner distinct from its effect on the public generally, any business in which a relative has an economic interest, if the public employee knows about the relative's interest.⁵ As noted above, the employee's program duties may include drafting and monitoring contracts. This presents an obvious problem **to the extent the department would task the employee with drafting and monitoring contracts with her husband's business.**⁶ The employee's participation in the development of an RFP also presents a problem, to the extent that one could reasonably anticipate that her husband's business is one of a small number of potential bidders. The Commission understands that a relatively small and close knit community of contractors serves this particular population.⁷ Thus, the employee cannot participate in any matter, including procurement matters, that affect her husband's business.

With one exception, the employee's responsibilities to staff the committee do not present an ethics issue because those duties are far more ministerial in nature (*e.g.*, keeping minutes, maintaining records, providing meeting notice). The exception is the employee's responsibility to report contractor performance to the committee.⁸ If her husband's business (or a competitor's business) is one of those contractors, the employee can be placed in a position of participating in a matter that could affect her husband's business.

II. THE COMMITTEE MEMBERS

Under the committee's Conflict of Interest Guidelines, committee members cannot participate in any conversations that would involve recommendations for specific programs or budgets related to or that could impact their organizations. While the Commission commends and encourages this practice, it is not required by the ethics law because the committee members are not public employees.

⁵ § 19A-11(a)(1)(C). The term "relative" includes a spouse. § 19A-4(n). "Business" means any for-profit or non-profit enterprise, including a corporation, general or limited partnership, sole proprietorship, joint venture, association, firm, institute, trust, or foundation. § 19A-4(b).

⁶ The Commission assumes that, as executive director of this business, the husband's economic interest in the business meets the threshold set out in § 19A-11(c).

⁷ The public employee denies that she develops contracts for the program. Employee Memorandum at 3. The Commission need not resolve this apparent dispute regarding the employee's procurement duties, generally. The key issue is the employee's participation in procurement matters **that affect her husband's business.**

⁸ This is only an issue to the extent that the employee is tasked with reporting to the committee on contractor progress. As noted above, the employee asserts that progress reports regarding contractor programs are provided directly by the contractors themselves. Employee memo at 3.

The ethics law applies to all public employees. The term “public employee” means

- (1) the County Executive and each member of the County Council;
- (2) any person employed⁹ by a County agency, including the director of the agency;
- (3) any person appointed by the County Executive or County Council to a board, commission, committee, task force, or similar body, whether or not:
 - (A) the person is compensated for serving on the body; or
 - (B) the body is permanent or temporary;
- (4) any member of the Revenue Authority, the Housing Opportunities Commission, or the Board of License Commissioners; and
- (5) **any other person providing services without compensation to a County agency if that person:**
 - (A) **exercises any responsibility for government-funded programs, procurement, or contract administration for an agency; or**
 - (B) **has access to confidential information of an agency that relates to government-funded programs, procurement, or contract administration.**

§ 19A-4(m) (emphasis added).

Because the committee members are not appointed by either the County Executive or the County Council, they are public employees only if they meet the test for volunteers, set out in subsection (5) above.

According to the employee’s memo, committee members are chosen because they possess expertise and knowledge on the target population served by the programs she manages. Employee memo at 4. Of course, it is this same knowledge and expertise that makes them likely vendors for program contracts.

The Commission concludes that the committee members do not meet the test for volunteers, based upon the information provided. The committee’s role is strictly advisory—it provides expert guidance and technical assistance in the conceptualization, design, development, and evaluation of the programs designed to serve a target population. Thus, its members do not exercise any responsibility for government-funded programs, procurement, or contract administration for an agency. Also, there is no evidence that committee members have access to confidential information of an agency that relates to government-funded programs, procurement,

⁹ An employer is any person who pays or agrees to pay compensation for services rendered and employment or employ means engaging in an activity for compensation. Compensation means any money or thing of value, regardless of form, including the sale or delivery of tangible or intangible property, that an employer pays or agrees to pay for services rendered. §§ 19A-4 (d), (f), & (g).

or contract administration.¹⁰

The Commission recently concluded that, in most situations, volunteer firefighters are not public employees subject to the ethics law because they typically do not exercise any responsibility for government-funded programs, procurement, or contract administration for an agency.

While the typical volunteer firefighter will not fall within this definition, some will. The Commission understands that most of the County's fire corporations receive monthly funding allotments from the County to pay for various station operations, including equipment, food, training, fuel, and insurance. If a volunteer firefighter exercises responsibility for the management of these funds (perhaps as a corporate officer), then he or she might fall within the ambit of this definition. Also, if a volunteer firefighter has access to confidential information related to a County procurement (perhaps as a member of a design or selection committee), then he or she might fall within the ambit of this definition.

Advisory Opinion No. 04-013 (Feb. 22, 2005).¹¹

Absent a waiver, a public employee must not participate in any matter that affects, in a manner distinct from its effect on the public generally, any business in which that employee has an economic interest. § 19A-11(a)(1)(B). Because these volunteer committee members are not public employees, they do not have a duty to recuse themselves under the ethics law.

Also, because these volunteer committee members are not public employees, a person engaged in a procurement matter with the County is not prohibited from employing or offering to employ them even if their duties include significant participation in that procurement matter. § 11B-52(a). For example, imagine that a committee member votes to recommend to the department that the County provide some service to the target population. If the County agrees to provide that service, and further decides to issue an RFP with the hopes of engaging a contractor to provide that service, a contractor responding to that RFP is not precluded from employing or offering to employ that committee member.

III. CONCLUSION

In conclusion, the public employee cannot participate in any matter that affects any

¹⁰ The Conflict of Interest Guidelines state that the department may share "designated" confidential information with committee members. If this occurs, members would be public employees and subject to the ethics law as to that information and any transaction related to that designated confidential information. For example, contractor monitoring reports are usually considered confidential.

¹¹ In a recent opinion the Commission also concluded that an independent contractor is not a public employee. *Advisory Opinion 04-014* (Jan. 26, 2005).

business in which her husband has an economic interest, including her husband's business. This precludes the employee from participating in any contractual activities involving her husband's business. This also precludes the employee from participating in any contractual activities, such as RFP development, to the extent that one could reasonably anticipate that her husband's business is one of a small number of businesses that might respond to the solicitation. Finally, we conclude that committee members are not public employees subject to the ethics law, so long as they do not have access to confidential information.

In reaching this decision the Commission has relied upon the facts as presented by the requestor, including its memorandum dated February 14, 2007 [sic], as supplemented and clarified by the employee's memorandum of March 30, 2006.

FOR THE COMMISSION:



August 29, 2006

Date

Richard N. Reback, Chair